IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 260 OF 2000

Vijay Tukaram Polekar ..... Appellant.

versus

The State of Maharashtra ..... Respondents.

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Shri S.P.Kadam for the appellant-appointed.
Shri B.R.Patil P.P. for the State.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 26TH OCTOBER, 2004.

ORAL JUDGMENT (Per Palshikar, J.);

1. Being aggrieved by the the order of conviction passed by the XI Additional Sessions Judge, Pune in Sessions Case No.437 of 1999 under sections 302 of IPC on 31-3-2000 the appellant has preferred this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us.

2. With the assistance of the learned counsel for the accused and the learned Prosecutor, we have scrutinised the records of the case and re-appreciated the evidence on record.

3. The prosecution case as emerges from re-appreciation of evidence stated briefly is that the accused was a friend of one Mama Musale who had some enimity with the deceased. It is alleged that on the date of incident, it was on Monday at about 10.00 a.m. the deceased was going to answer the call of nature towards the hill. His wife saw accused Vijay following her husband. After sometime, her husband returned, he was hurt and was crying of pain. When the wife of the deceased asked him, the deceased told his wife that he was assaulted by the accused. Complaint was lodged, investigation was undertaken, and the accused was prosecuted for the murder of the deceased.

4. The prosecution has examined as many as 11 witnesses to prove its case. The leraned trial Judge on appreciation of that evidence came to the conclusion of guilt and consistent with that, convicted the accused as aforesaid. Being aggrieved by that order, this appeal has preferred.

5. P.w.1 Mangal is the wife of the deceased who speaks of extra judicial declaration of her husband, the deceased, that the deceased was stabbed by accused Vijay Polekar. In her deposition she has also stated

that when the deceased came crying, her mother-in-law i.e. the mother of the deceased came out of her house and another person by name Vinayak residing in that locality also came there and it was with the help of her mother-in-law and Vinayak the deceased was taken to Sasoon hospital where the deceased was pronounced dead.

6. However, we have the deposition of P.w.2 Bebibai who is the mother of the deceased who also speaks about the dying declaration made by the victim saying that it was accused who stabbed him. But the entire testimony of this witness conspicuous about presence of Vinayak. She does not even mention about the presence of Vinayak. It is therefore directly contrary to what has been stated by P.w.1. If this witness is to be believed, then it will have to be inferred that victim was taken to the hospital by the two women, one wife of the deceased and the other mother of the deceased. Conversly the testimony of P.w.1 is to be accepted, she mentions presence of Vinayak and also the assistance rendered by him. Unfortunately the prosecution has not examined this Vinayak.

7. P.ws. 3 and 4 are panchas, who have turned completely hostile. Therefore the prosecution failes to prove any recovery. P.w.5 is Dr. Milind who proved

that the deceased met homicidal death. P.w.6 is a police cobnstable who heard P.w.1 saying while admitting the victim to hospital that the victim was assaulted by the accused. It is however submitted overheard by a police and not in the presence of the accused and therefore it has no evidentiary value.

8. P.w.7 proved the spot panchanama. P.w.8 was examiend to prove recovery of knife at the instance of the accused but he has turned hostile and has denied the suggestion that the recovery of knife was at the instance of the accused persons and was in the manner it was done. P.w.9 is another panch who has turned hostile. P.w.10 is A.P.I. who prepared the spot panchanama and P.w.11 is P.I. who was the investigating officer.

9. There are no eye witnesses in this case. There is no proof whatever of any enimity between the accused and the victim. All that has been indirectly averred by P.w.1 wife of the deceased is that Mama Musale had some grievance against the accused and accused had some grievance against Mama Musale and accused was a friend of that Mama Musale. Assuming it to be a correct version the prosecution has miserably failed to prove the motive strong enough to result in murder of the

victim. In fact there is no evidence of any motive at all, nor is there any proof of that the accused would want to kill the victim. The prosecution has failed to examine Vinayak who would have been an independent witness. Even the interested testimony of P.ws.1 and 2 is not cohesive and they are not corroborate each other on material particulars. Recovery of knife is not proved. In such circumstances, it is unsafe to pass conviction under section 302 of IPC which requires adequate proof both of homicidal death and intention to cause it. In this case homicidal death is proved but there is no proof that it was caused by the accused and he had the intention to cause it. We are therefore unable to approve the judgment of the learned trial Judge, convicting the accused and sentencing him as aforesaid. In our opinion, the learned Judge erred in convicting the accused under section 302 IPC when the evidence was so inadequate and unreliable. In the result, therefore, the appeal must succeed and is allowed. The accused is acqitted of the offence under section 302 of IPC. The judgment and order of the trial Judge is set aside. The accused is in jail. He be released forthwith, if not otherwise required.

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